CHEE CHI TIAM v. PUBLIC PROSECUTOR

[A.Cr.J. (Yusof Abdul Rashid J.) March 21, 1981]

[Johore Bahru — Criminal Appeals Nos. 44 & 45 of 1979]

Criminal Law and Procedure — Appeal — Charge of voluntarily causing grievous hurt — Appeal on findings of fact — Evidence of alibi not allowed to be introduced — Penal Code, ss. 34 & 326 — Criminal Procedure Code (F.M.S. Cap. 6), s. 402A.

Evidence — Alibi — Non-compliance with s. 402A, Criminal Procedure Code — Effect of.

In this case the appellant had been convicted on a charge under section 326 of the Penal Code read with section 34. His appeal was mainly based on the findings of fact by the learned President of the Sessions Court. An application by the appellant to adduce evidence of *alibi* was refused, as the provisions of section 402A of the Criminal Procedure Code had not been complied with.

Held: (1) the appeal was based on the findings of fact by the trial court and as it had not been shown that the judgment of the trial court was against the right of the evidence, the appeal must be dismissed;

(2) it had not been established that the learned President had in any way misdirected himself on any questions of law;

(3) the evidence of *alibi* was rightly not allowed to be adduced, as the provisions of section 402A of the Criminal Procedure Code had not been complied with.

Cases referred to:-

(1) *Gui Hoi Cham & Ors.* v. *Public Prosecutor* [1970] 1 M.L.J. 242, 244.

(2) *Tengku Mahmood* v. *Public Prosecutor* [1974] 1 M.L.J. 110.

(3) *Muniandy & Ors.* v. *Public Prosecutor* [1966] 1 M.L.J. 257.

(4) *R.* v. *Turnbull & Ors.* [1976] 3 All E.R. 549.

(5) *Mahinder Singh* v. *Public Prosecutor* [1967] 1 M.L.J. 126.

(6) *Arumugam & Anor.* v. *R.* [1947] M.L.J. 45.

CRIMINAL APPEALS.

Chew Whye Tee for the appellant.

John Louis O'Hara for the respondent.

Yusof Abdul Rashid J.: Chee Chi Tiam, hereinafter referred to as "Chee", stood charged and tried by the learned President of the Sessions Court, Johor Bahru on the following charge —

"That you on October 12, 1976 at about 5.00 a.m. with 6 or 7 others at the gate at Kulai Besar Estate, Kulai, in the State of Johore, in furtherance of the common intention of you all, voluntarily caused grievous hurt to one Siow Jin Kwong (m) by means of 'Parang', and that you have thereby committed an offence punishable under section 326 read with section 34 of the Penal Code."

After a full trial the learned President found Chee guilty of the offence charged and on conviction sentenced him to three years' imprisonment. Chee is dissatisfied with the judgment of and sentence imposed by the learned President and now appeals to the High Court. The Public Prosecutor feels that the sentence is inadequate and now cross-appeals against sentence. However, the learned Deputy Public Prosecutor before me is not pursuing any further with the cross-appeal and so I am dismissing the cross-appeal against the inadequacy of sentence.

At the close of the case for the prosecution, the learned President found the following facts were proved —

"On October 12, 1976 at about 5 a.m. the complainant (PW8) was assaulted by 7 or 8 persons with parangs near the gate in front of Kulai Besar Estate, Kulai. PW8 was about to cross the main road to wait for transport to go to work as a lorry attendant when a car approached from the side of the road and went for him. He jumped away and the car stopped. The occupants of the car chased him with parangs in their hands. He ran away. They caught up with him and assaulted him with the parangs. He could recognise 3 of them clearly as there were 2 electric lights — one was at the gate where he was assaulted and the other was a street lamp — and visibility was fair. One of the assailants was the accused whom he had known for about 2 years prior to the assault. The accused personally inflicted blows on PW8's right hand and on the back of the head, more towards the right. PW8 was then unarmed. The assailants ran away when someone shouted 'police!'. PW8 was seriously injured. He was taken to the General Hospital Johor Bahru where he was treated as an emergency case. He was discharged on November 22, 1976, 40 days after the date of his admission to the hospital."

In a carefully written judgment, the learned President had made thorough analysis of the evidence adduced by the witnesses for the prosecution and had found as proved that grievous hurt was inflicted on PW8, that such hurt was caused by parang or parangs, that several persons were involved in causing such grievous hurt on PW8, that there was indeed common intention to cause such grievous hurt and that there was a motive for the said brutal attack.

The only material issue which is questioned relates to the identity of Chee being one of the assailants.

Chee's Presence at Kulai Besar Estate at 5.00 a.m.

In the petition of appeal, the first ground attacked the finding of fact by the learned President that Chee had left Johore Bahru for Kulai in the morning of the date in question. It was alleged that the learned President had accepted Chee's evidence that he slept in Johore Bahru that night. In the grounds of judgment of the learned President, it is stated —

"I have considered the whole of the evidence of the defence in the light of the prosecution case. I accepted the defence story that the Accused's lorry was stranded in Johor Bahru on the evening of October 11, 1976 due to the Customs declaration forms not being in order that evening. I accepted the Accused's evidence that he left Johor Bahru for Singapore with the timber lorry on October 12, 1976 at about 8.30 a.m.

However I rejected his story that he and 6 or 7 others did not assault PW8 on October 12, 1976 at about 5 a.m. at the gate of Kulai Besar Estate, Kulai."

The reasons for rejecting Chee's contention that he could not possibly be in Kulai about 5 a.m. that material morning were stated by the learned President in the following words —

"The distance from Johor Bahru to Kulai Besar Estate is only 21 miles which could be undertaken within 30 minutes each day. There was therefore ample time for the Accused and his accomplices to execute a plan which in my view was hatched up some time before the assault and waiting to be executed at a convenient time. After the assault there was ample time for the Accused to be back in Johor Bahru and drive his timber lorry to Singapore. The assault by the Accused and his accomplices at the time and place specified in the charge was therefore not an impossibility — it could be executed quite easily given the proper motive and determination."

There was already evidence before the learned President that the assailants travelled in a car and to one who is familiar with the geographical layout of the scene in relation to Johor Bahru will have but to

agree with the conclusion arrived at by the learned President. The fact that Chee left with the timber lorry for Singapore about 8.30 a.m. that material day does not render it improbable that he was in Kulai Besar Estate at about 5.00 a.m. Not less than 3 hours had lapsed between the time the incident was alleged to happen and the time Chee left for Singapore.

Learned counsel cited the judgment of the Federal Court in the case of *Gui Moi Cham & Ors.* v. *Public Prosecutor*[1] where Ong C.J. (Malaya) in delivering the judgment of the Federal Court said —

"As to the fourth appellant, his defence was an *alibi*, supported by his employer, whose evidence was not shaken in cross-examination. The learned judge said that it was 'possible' for him to have left the rubber estate to participate in the fight and then return in time to be observed continuing his work. With respect we do not think this direction was adequate... the jury should have been further directed that 'they must be *satisfied* that his defence was unsound before they convicted the appellant'; see *R.* v. *Finch* (1916), 12 Cr. App. R. 77, 79."

It is to be noted that although Chee's defence was one of *alibi* no evidence in support was adduced and the learned President was the judge of fact too. In no uncertain terms the learned President said that he rejected the contention of the defence that it was not possible for Chee to be at Kulai Besar Estate at 5.00 a.m. Hence, that Federal Court case should be distinguished.

In this respect, I am not willing to interfere with the finding of the said fact by the learned President since there is nothing perverse about it.

Conviction on sole evidence of PW8

It was alleged that PW8 was a self-confessed gangster and that the learned President convicted Chee on the evidence of PW8 alone.

The learned counsel drew my attention to certain parts of the evidence of PW8. The following evidence of PW8 was especially referred to —

"To my knowledge these attackers were secret society members. They belong to Kim Lau Tong secret society. They were active in Saleng and Sedenak Estate.

I was not a member of any secret society but I did mix with members of the secret society.

That was how I came to know that the attackers were members of the secret society.

Now my movement is restricted by the police. Formerly I mixed with members of the Ang Seng Tong Secret Society.

These two secret societies were on good terms with each other at the time of the incident."

I can find nothing from the above-quoted evidence to justify a finding that PW8 was a self-confessed gangster. Neither did the learned President make any such finding in his grounds of judgment. I am urged to make a closer scrutiny of the evidence of PW8 and to come to a different conclusion than that of the learned President. It was submitted that as the learned President had relied solely on the evidence of PW8, I was urged to determine whether or not it was proper for the learned President to convict Chee on the uncorroborated evidence of PW8. As regards authorities, the learned counsel cited the case of *Tengku Mahmood* v. *Public Prosecutor*[2] and *Muniandy & Ors.* v. *Public Prosecutor.*[3]

Having carefully considered the grounds of judgment of the learned President in this respect, I find that the learned President was amply justified in giving due weight to the evidence of PW8 and since it was not shown that PW8 should be treated in the same manner as an accomplice, the evidence of PW8 needed no corroboration for the learned President to rely on the said evidence to convict Chee. It cannot be said that the incident was a clash between two opposing secret societies since PW8 was alone when he was attacked and was on his day to work at 5.00 a.m. and PW8 had not been shown to be a member of any secret society.

The learned President who had the advantage of seeing and observing PW8 when he was giving evidence in court, of which I am denied, found PW8 as a creditable witness. Further, it was the finding of the learned President that the motive of the assault had nothing to do with any feeling of enmity between two secret societies.

Identification of Chee as an assailant

In evidence PW8 testified that he recognised Chee as one of the assailants because the scene of the incident was fairly lighted. The learned President found it as a fact that the visibility was fair at the material time and place. This was what the learned President said in his grounds of judgment —

"That the visibility of the scene of the assault was fair found support in the evidence of PW4. He was staying at Kulai Besar Estate. He was about 60-70 yards away from the commotion. He said he opened his window and he saw a lot of people fighting at the entrance. Now if PW4 could see people fighting from 60-70 yards away, it showed that at that time and place where the assault took place the visibility was at least fair."

The learned counsel referred to the evidence of PW4 and PW11 but I can find nothing to justify my differing from the finding of the learned President.

It was contended that PW8 might have mistaken the identity of Chee since there was not enough light to identify Chee positively with. Further, identification was made in the course of PW8 being assaulted by 7 or 8 persons which took place in a flash. The learned counsel cited the English Court of Appeal case of *R.* v. *Turnbull & Ors.*[4] and quoted several passages therefrom. The learned counsel alleged that the learned President had not acted with caution when he accepted the evidence of PW8 regarding the identity of Chee, and contended that in the absence of any corroborative evidence, under the circumstances, the benefit of doubt should be given to Chee. The learned counsel drew my attention to the fact that PW8 was running away from the assailants, that PW8 was wearing glasses, and most probably the whole incident took place within ten minutes. However, full reliance was made on the piece of evidence given by PW8 to the following effect —

"Assuming that I did not see the Accused attacked me with a parang, I would still say that he was the one who attacked me because he had earlier warned me not to see his cousin sister."

for the contention that PW8 was not positive regarding the identity of Chee.

The learned counsel referred to several passages in the Federal Court case of *Mahinder Singh* v. *Public Prosecutor*[6] where in delivering the judgment of the Court, H.T. Ong F.J. (as he then was) said —

"... It was not sufficient merely that the complainant appeared quite certain in his own mind that the accused was his assailant. It was clearly necessary for the court to examine also the grounds of his belief before regarding the question as closed. We have therefore, taken into consideration the complainant's answers elicited in cross-examination, which were undoubtedly material but which the judge had failed to take into account.'

His Lordship continued —

"Then again, the positive statement of fact 'Yes, I saw him inflict the injury here,' was negatived and belied by the following answer to a question by the judge: 'Because I saw the accused there and there was no one else. Yes, I assumed it was the accused who inflicted the injury on me.'

When the above self-contradictions are considered — which, we regret to say, was not done by the trial judge at all — there can no longer be that degree of satisfaction of guilt of an accused person which alone can justify a verdict of guilt."

It is observed that the main complaint in that case was that "... Because the judge considered 'his evidence as regards his ability to identify his assailant was completely unshaken' he found the appellant guilty," and this was shown to be not the case when the evidence of the complainant was taken in its totality. In that case the complainant did not see the accused inflict the wound but assumed so since nobody else was around except the accused. The incident occurred in the dark and the complainant had some toddy before he went home.

In the instant case, the learned President had carefully considered the evidence of PW8 before he relied on it. PW8 faced his assailants and recognised three of them. There was sufficient light with which PW8 could identify Chee and PW8 was positive that Chee was one of the assailants who had inflicted the wound by using a parang. Chee was known to PW8 for two years and had warned PW8 on one occasion not to go steady with Chee's cousin sister. I believe the reply given by PW8 as quoted above must have been made in response to a fact which was put to him by the learned defence counsel. Finally, it has not been shown that PW8's evidence was contradicted by any other witness for the prosecution nor has it been shown that PW8 himself had made any contradictory statement in his evidence, requiring the learned President to caution himself before accepting the evidence of PW8 in its entirety.

It was further contended that PW8 had not revealed the identity of Chee as early as could be to the police. It was also alleged that had PW8 informed the police about Chee, the police would have been looking for Chee, and since no identification parade was conducted PW8's evidence regarding the identity of Chee should not be believed.

In his grounds of judgment, the learned President has adequately dealt with this aspect of the case and I find no useful purpose in repeating it except to say that the learned President had put his mind to it and had rejected all these contentions.

First Information Report

The learned counsel complained that no first information report was lodged by PW8. In answer to that the learned Deputy Public Prosecutor drew my attention to exhibit P1 produced in the lower court which is a first information report recorded by Police Constable 1577 about a fight at Kulai Besar Estate, Kulai. In the circumstances, even if PW8 were to make a report, it would not have been a first information report under the Criminal Procedure Code and would not have been admissible as such.

Evidence of alibi

In the course of the trial in the lower court, an application was made on behalf of Chee to adduce evidence on *alibi*, and to adduce evidence in support of *alibi* but, since the provisions of section 402A of the Criminal Procedure Code had not been complied with, application to introduce evidence in support of *alibi* was refused. I perused through the notice purported to have been issued under section 402A of the Code, signed by Mr. R.K. Menon, the then defence counsel on record, and I found that it had not complied with the requirements as specified under that section. I am of the view that the learned President was right in refusing Chee to proffer evidence in support of *alibi* to substantiate the defence of *alibi*. Whatever evidence was adduced on behalf of the defence was for the purpose of discrediting the testimony of PW8 and the learned President, with whose findings I am in full agreement, had ruled that PW8 was a witness of truth.

Conclusion

It has not been established before me that the learned President had in any way misdirected himself on any question of law. The appeal is based on the findings of facts by the learned President and in this regard, suffice for me to cite the case of *Arumugam & Anor.* v. *R.*[6] where Worley J. said at page 47 —

"... I think I need not go further into the matter except to say ... that the proper criterion is that the appellant on questions of fact has to satisfy the Appellate Court that the judgment was against the weight of the evidence and that I think must be the test whether it is an appeal against an acquittal or against a conviction."

In the instant case since I am not satisfied that the judgment of the learned President was against the weight of the evidence adduced before him, this appeal fails.

The appeal against conviction and sentence lodged by Chee is dismissed.

Appeal dismissed.

Solicitors: *Chew, Ong & Partners.*